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No. 92-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT E. LEWIS and VICTORIA LEWIS,

Petitioners,

vs.

BABCOCK INDUSTRIES, INC.,
McDONNELL DOUGLAS CORPORATION
and GENERAL DYNAMICS CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals commit error when it concluded that the record of government investigation, knowledge and approval of the design of a military aircraft component was sufficient to satisfy *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988)?

STATEMENT REQUIRED BY RULE 29.1

The respondent named in the caption as Babcock Industries, Inc., is now named FKI Industries Inc. Disregarding intermediate wholly-owned holding companies, its ultimate parent company is FKI plc. Leaving aside wholly-owned subsidiaries, it has the following subsidiaries: F. Platen GmbH; La Teledynamique S.A.; ACK Controls Inc.; Cables Automotrices S.A.; Instrumentos Bristol S.A. De CN; and Inmobiliaria Acco S.A. De D.V.

Respondent McDonnell Douglas Corporation has no parent companies. Leaving aside wholly-owned subsidiaries, it has the following subsidiaries: Finnish-American International Trade, Inc.; and Irish Aerospace, Limited.

Respondent General Dynamics Corporation has no parent companies. Leaving aside wholly-owned subsidiaries, it has the following subsidiaries: General Dynamics Investment Holding Co., A.S.; Hellenic Business Development and Investment Company, S.A.; Mansour - General Dynamics Ltd.; Perdata Corporation; and TUSAS Aerospace Industries, Inc.

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INTRODUCTION

Respondents Babcock Industries, Inc., McDonnell Douglas Corporation and General Dynamics Corporation respectfully pray that this Petition for a Writ of Certiorari be denied. The questions purportedly raised are not in fact presented by the decision below. That decision rests on the application of existing principles to a very specific factual situation. The Second Circuit made no novel legal or policy decision of general impact, and its decision created no issue of lack of uniformity. There is nothing in the decision below which merits, much less requires, plenary review by this Court.

COUNTERSTATEMENT OF THE CASE

The Petition skims by, or flatly misstates, certain aspects of the facts which are material to the decision below and the reasons this case does not merit review on certiorari. A brief restatement of the case is therefore necessary.

Background

This action was commenced by Capt. Scott Lewis, a pilot who continued on flying status in the United States Air Force after the crash of an F-111 aircraft he was flying on February 23, 1987, near Lakenheath, England. The F-111 is a highly sophisticated, long-range fighter-bomber. The aircraft's crew module, encompassing the cabin and crew stations, forms an integrated portion of the aircraft during flight and also functions as the aircraft's escape system. At the heart of this action is the design of the F-111 and its crew escape module -- specifically its forward repositioning cable. The United States Air Force continues to purchase and use the same cable to date, over six years after its detailed investigation of the accident.

The Initial Design Approval

According to the testimony of Gerald D. Friedman, the Chief of Configuration Management for the Air Force F-111 System Program Office between

1962 and 1973, the F-111 project was initiated by the Air Force in the late 1950s and early 1960s. The Systems Program Office, or "SPO," was created for the purposes of granting the design and manufacturing contract and overseeing the work (JA 1297-99). General Dynamics was selected as the general contractor, with McDonnell Douglas as the crew module subcontractor and Babcock as the supplier for this cable (which was specifically designed for this aircraft) (Pet. 19a; JA 2721-22).

The evidence in the record from Mr. Friedman established that during the 1960s the Air Force SPO controlled the development and production of the F-111 aircraft. The SPO grew from a handful of managers and engineers in 1962 to nearly 300 in 1967 (JA 1297). According to Friedman, "[t]he SPO supervised, criticized, inputted, and surveyed the effort" (JA 1298). The crew module was designated a critical item by the Air Force. The SPO had to review the design specifications of all critical items, including the drawings and the hardware. Government engineers visited the contractors' plants to examine the hardware and witness tests. In addition, there were Navy and Air Force representatives stationed at General Dynamics and McDonnell Douglas to review proposed changes to the components of the aircraft (JA 5508-11).

As both courts below found, the F-111 and its crew module underwent the scrutiny of a "First

Article Configuration Inspection" or FACI, a process by which the government inspected them while in production (Pet. 4a, 19a). During the FACI, the government inspected the component parts of the aircraft to ensure they complied with approved specifications (JA 5480-81, 5722-23).

It is undisputed that government representatives were present during various tests (including sled tests which simulated actual ejections and which included the forward repositioning cable) and during the qualification trials of the crew module. The Air Force also subjected the aircraft to environmental testing, placing the aircraft in a climate chamber and flying the aircraft to various parts of the world to conduct environmental tests (JA 2185-87).

Thus, contrary to petitioners' assertions, and as the district court held, there was overwhelming proof in the record establishing government approval of the crew module and its forward repositioning cable when the aircraft was first designed (Pet. 25a-26a). In holding that summary judgment was proper based on the government's in-service approval of the cable, the Court of Appeals simply bypassed the initial design approval issue (Pet. 2a). It did not, as petitioners claim, find there had been no such approval.

The In-Service Design Approval

During the mid 1970s, the F-111 windshields were modified by the Air Force because several aircraft were lost as a result of birds penetrating the windshields. The modification of the aircraft was performed by Pittsburgh Plate Glass ("PPG"), with no action by the three defendants. The modification included a new fairing or covering which was placed between the new windshields and directly over the forward repositioning cable.

The government's principal engineer in charge of the F-111 crew module, Mr. Pat Santucci, testified that in 1979 the Air Force became aware that corrosion was forming on the forward repositioning cables of several F-111s. Prior to the installation of the PPG fairing, the Air Force had "no problem for years" with the cables (JA 3377, 3403). After extensively studying the problem, Santucci authored a report in 1980 which demonstrated the government's attention to the details of the cable materials. It stated in part:

> The cable assemblies are manufactured with a polyethylene covering over the full length of the cable. When the cover remains intact, long term protection from corrosion can be expected. However, if the cover thickness is penetrated, moisture can contaminate the cable surface and corrosion results.

> In service the cable covering does in fact become damaged. The primary cause of damage is from spring clips that hold the center beam fairings to the module (JA 867).

As Mr. Santucci further explained: "I knew that the fairing was the culprit as early as 1980" (JA 3425).[1]

In testimony, engineer Santucci described the problem:

> [O]n the original design the clip was prevented from going too deep into the compartment or the channel.... That is an ideal condition to have and that is the design element that we lost when we went to [the PPG fairing] .... [W]hen we went to the new fairing, we really compromised the design of the cable is what happened. At that point it made every cable get cut and suddenly we had an explosion of rusted cables (JA 3472-73).

In 1982 the Air Force began to replace all the cables in the F-111 fleet with new cables, using

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[1] As they did below, Petitioners repeatedly try to impeach the government's analysis because they do not think it focused enough on the details of the cable's materials. Their efforts cannot obscure the undisputed fact that the government was totally aware of those aspects of the design which presented the problem.

precisely the same cable design (JA 873, 3381). The Technical Order directing the change stated:

> The purpose of this Time Compliance Technical Order is to eliminate the possibility of cable failure due to corrosion (JA 873).

Thus, the cable on the mishap aircraft was replaced in January 1983 pursuant to this decision by the Air Force (JA 888, 3416-17). The new Babcock forward repositioning cables were inspected by government inspectors prior to shipment from the Babcock plant to ensure that they met the requirements of the government contract with Babcock (JA 1470-75, 1480-82, 1489-92, 2931-32). They were accepted by the government as complying with the requirements of that contract (JA 832, 1333).[2]

In short, beginning in 1979 and continuing thereafter, the Air Force knew about corrosion on the forward repositioning cable, addressed that issue without looking to defendants, and made a conscious decision to continue using the same cable design. The Air Force did not consult with defen-

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[2] After the forward repositioning cables were replaced, the Air Force discovered during maintenance that the protective covers of some cables were still being cut (JA 1516-17). In response, the Air Force decided to change its procedures for treating damaged cables (JA 889). Again, the defendants did not participate in the Air Force's analysis; indeed, they did not know about it (JA 1516-17, 1536-38, 1555).

dants about the corrosion issue, and there was not a shred of evidence that defendants were aware of anything the government did not know (JA 1507, 1510-12, 1516-17, 1536-38, 1555).[3]

The Post-Accident Design Approval

Air Force employees investigated the Lakenheath accident. Tests conducted by the Air Force on other cables confirmed their ability to meet the design specifications even when impaired by mild corrosion (JA 3266, 3422, 3499-500). The Air Force also reevaluated the cable design and considered possible alternative designs and materials (JA 878, 1520-21, 3267-68). It considered using other "type coverings, some that might be less susceptible to tearing" or perhaps provide a "better moisture barrier" than that provided by the existing covering (JA 1527-28, 1615-16, 3268-69, 3323-24, 3393-94).

As a result of its investigation, the Air Force determined that the existing cable design was safe for continued use. It did not require any changes to be made to the cable design (JA 1577-78, 3284,

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[3] The Petition repeatedly claims that respondents "misled" the government in its analysis and withheld information about earlier incidents (Pet. 5, 6-7, 14). These outrageous and unsubstantiated allegations were rejected by the district court, which found that the government had "superior knowledge to that of defendants" (Pet. 30a). The Court of Appeals labeled the challenge to the government's knowledge "unpersuasive" (Pet. 15a).

3394, 3508), and indeed directed the new manufacture and purchase of the same cable design (JA 1525, 1545-46, 3266, 3283-84, 3345, 3381; see JA 863).[4] "It is a good cable," explained Robert L. Campbell, Air Force F-111 Escape Systems manager and Systems Manager for all ejection systems in the Air Force inventory, "and the cable will last for the life of the aircraft if it is not cut" (JA 1500-01, 1610). As Pat Santucci confirmed, "I'm happy with the design of the cable" (JA 3404). To this day the original cable remains the Air Force's cable of choice and remains in use on all F-111 aircraft (JA 1545).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals holds, in accordance with this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), that where the government approves the design of an Air Force fighter-bomber aircraft, the aircraft's manufacturers may not be held liable for an alleged design defect. The Second Circuit's decision is a classic application of *Boyle*.

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[4] The Air Force redesigned the fairing so that it "reintroduces" the feature of the original fairing design, absent in the PPG redesign, which prevented the clips from cutting the cable cover (JA 3286-87, 3404, 3473). Air Force review of the cable was closed with the implementation of an order directing the installation of the new Air Force fairing and the same cable, built to the initial design specifications (JA 3292-93; see JA 899).

The Petition boils down to the assertion that the Court of Appeals erred in holding that the government approval required by *Boyle* had been established, as a matter of law, on the basis of the undisputed fact that the government had studied the cable's susceptibility to corrosion and knew about that susceptibility prior to ordering replacement cables of identical design for all F-111 aircraft in the government's fleet, including the replacement cable involved in the subject accident. This assertion is totally devoid of merit. The Second Circuit's conclusions are wholly appropriate in light of the record and are completely consistent with *Boyle* and its progeny.

The decision below does not in any event merit review by this Court. It does not present a novel federal question, nor is it in conflict with any decision of another court of appeals. Moreover, the decision below does not have significant precedential impact, or implications beyond its determination of the rights and liabilities of the particular litigants, because it rests on a specific and unusual record. The decision below simply applies existing precedents to that record to affirm a summary judgment entered because there was no genuine issue of material fact raised with respect to a dispositive defense.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW SIMPLY AND PROPERLY APPLIED SETTLED PRINCIPLES TO A GOVERNMENT DESIGN DECISION.

The government contractor defense shields manufacturers of military hardware from tort liability for flaws in product design where the alleged design feature was considered and approved by the government. In holding that defendants could establish the government contractor defense based upon the government's informed selection of the cable design during the 1980-82 time period, the Second Circuit correctly and expressly adopted the reasoning of the Fourth Circuit in *Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989), and *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986), *cert. denied*, 486 U.S. 1233 (1988). Plaintiffs cannot point to any decision by any lower court in conflict with these authorities.

The Second Circuit carefully analyzed the application of *Boyle* to the government's design decision during 1980-82 to buy new cables using the specific design challenged below (Pet. 10a-14a). As the district court before it had concluded, the Court of Appeals held that defendants had shown an entitlement to summary judgment based on a deliberate, informed government investigation of a problem, a government assessment of the existing design, and

making various unilateral modifications in its internal maintenance manual.[5] This is not a case in which a manufacturer obtained "no more than a rubber stamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them." *Boyle*, 487 U.S. at 515 (Brennan, J., dissenting). The "design feature in question," the cables' resistance to corrosion, "was considered by a Government officer, and not merely by the contractor itself," 487 U.S. at 512, more than once.

Petitioners' efforts to focus on isolated phrases in the *Boyle* decision (Pet. 9-10) do not establish that the decision below diverged from *Boyle*. *Boyle* requires a government approval of a *design*, but nowhere does it state or suggest that this approval has to take place at a particular, early point in the design process.

Petitioners' claim that the "significant conflict" contemplated by *Boyle* was not shown in this case rests on the factual characterization -- rejected by the court below -- that the Government did not know

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[6] Thus, contrary to petitioners' rhetoric, this case does not present any issue about the effect of mere continued usage of an allegedly defective product by the Government, its disposition does not control that issue. There is no basis offered, nor is one intuitively apparent, to support petitioners' claims that this decision is likely to have frequent or broad application.

what it was doing and instead made some sort of "blanket military procurement decision" (Pet. 12). In particular, the criticisms of the decision below by repeated reference to *Boyle's* discussion of a "stock purchase" are completely misleading. As both the district court and the Court of Appeals concluded, the record shows a deliberate design decision and not a *pro forma* or off-the-shelf order -- indeed, as noted above, the cable was designed specifically for the F-111. Said another way, petitioners' "questions presented for review" posit issues which are simply not presented by this case and which could not be decided on this record.

Likewise, the claim that the government had no choice to select a new or different design in 1982 (Pet. 11-12) is totally unsupported by the record, which shows that the government was able to implement a complete redesign of the F-111 windshields and replace those in all F-111s while the aircraft were in service (Pet. 19a-20a). Petitioners made the same argument to the Second Circuit, which expressly held that there was an insufficient factual basis for it (Pet. 16a, n.4). There is nothing here for this Court to review.

Petitioners' arguments all depend ultimately and entirely on the contention that "the Government's decision to order replacement cables in 1982 was not the considered, informed and balanced judgment and discretionary `critical design choice' by the

Government ...." (Pet. 10-11). This contention was rejected by the Court of Appeals (Pet. 13a), as it had been by the district court (Pet. 20a, 26a-27a). The Petition thus simply disagrees with the courts below as to the application of settled law to specific facts. Petitioners are dissatisfied with the result below, but this Court does not "sit for the benefit of particular litigants," *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Review by the Court is not warranted in this situation. *E.g., General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1988).

There is certainly no compelling reason for this Court to reach out to review this particular application of *Boyle*. Providing defendants with a defense based on the Air Force's in-service experience is directly supported by this Court's observation in *Boyle* that:

> [The selection of the design of military equipment] often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.

487 U.S. at 511. The government plainly gains information relevant to such trade-offs through its in-service experience.

Boyle specifically rejected a formulation of the government contractor defense that would have turned in part on who designed the alleged defective product. 487 U.S. at 513. It makes no sense to insulate a military contractor from liability for a government design decision while a weapon system is "on the drawing board," but not from a government design decision reached after years of in-service experience.

Moreover, any rule that would restrict application of the government contractor defense to "design phase" decisions would engage the lower courts in needless "line drawing" and speculation as to the life of a complex, sophisticated and continually evolving weapon system. The F-111 aircraft is a case in point. During its service life, hundreds if not thousands of modifications engendered by the engineering advances of the past two and one-half decades have been made to the aircraft. As with most military aircraft, the "design phase" never really ended. The lower courts should not be required to engage in fruitless attempts to draw such an artificial line.

As the Fourth Circuit observed in *Dowd*, 792 F.2d at 412, a military service's decision to continue to use a military product despite known experience with an alleged defect:

> may reflect the Army's judgment that, despite the defects alleged in this tort suit, the equip-

> ment had largely accomplished its mission and proved its military worth. It may reflect the Army's view that safety problems were remediable through pilot training, or that any alteration of the rotor system entailed increased risks or costs. It may simply reflect the Army's disinclination to tinker with a system that had over time worked well enough. Whatever the reasons, it is not up to the jury to second-guess this military judgment.

Of course, this conclusion in *Dowd* simply echoes this Court's statement in *Boyle* that the purpose of the government contractor defense is to avoid "`second-guessing' of these judgments." 487 U.S. at 511. *See also United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). The Petition is rife with factual arguments which epitomize precisely such second-guessing. The decision below is entirely consistent with both the letter and purpose of *Boyle* and does not present any occasion for this Court to revisit this highly-specific area.

II. THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES PERMITTING SUMMARY JUDGMENT.

Petitioners' third argument (Pet. 13-14) purports to address a procedural defect in the grant of summary judgment, but all petitioners are really doing is arguing with the Second Circuit's assessment of

what the record reveals about the government's knowledge. They point to nothing in the Second Circuit's decision which even hints that the Court of Appeals deviated from established summary judgment standards.

The basic fact upon which the Second Circuit's decision rests -- the government's knowledge, prior to reordering the cable, of its susceptibility to corrosion -- was undisputed in the district court and conceded during oral argument in the Second Circuit. The government contractor defense was properly decided as a matter of law because petitioners did not raise any triable issue as to any fact material to the disposition of that defense. At the risk of repetition, the Petition does nothing more than request that this Court second-guess the Court of Appeals as to the record and then in turn allow petitioners to second-guess the government's discretionary decision.

To the extent that the Petition suggests that *Boyle* mandates that the government contractor defense be resolved through a trial, it plainly misreads *Boyle*. This Court expressly contemplated that the Fourth Circuit might properly enter a judgment for the defendant based on the government contractor defense notwithstanding a plaintiffs' verdict. 487 U.S. at 514. In fact, on remand the plaintiffs were not allowed to get to the jury. *Boyle v. United Technologies Corp.*, No. 85-2264 (4th Cir. 1988).

And cases applying the government contractor defense to grant a motion for summary judgment are legion. *E.g., In Re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831 (2d Cir. 1992); *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990); *Kleemann v. McDonnell Douglas Corp.*, 890 F.2d 698 (4th Cir. 1989), *cert. denied*, 495 U.S. 953 (1990); *Skyline Air Service Inc. v. G. L. Capps Co.*, 916 F.2d 977 (5th Cir. 1990); *In re Aircraft Crash Litigation Frederick Maryland*, 752 F. Supp. 1326 (S.D. Ohio 1990), *aff'd*, 935 F.2d 269 (6th Cir. 1991).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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